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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1008

SIDNEY S. HARRIS, *et al.*,

Petitioners,

v.

ALLEGHENY-LUDLUM INDUSTRIES, INC., *et al.*,

and

UNITED STATES OF AMERICA, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioners Sidney S. Harris, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 18, 1975.

Opinions Below

The opinion of the court of appeals is reported at 517 F.2d 826, and is set out in the Appendix, pp. 13a-119a. The opinion of the district court of June 7, 1974, is reported at 63 F.R.D. 1, and is set out in the Appendix, pp. 1a-12a. The opinion and order of the district court of January 6, 1976, which are not reported, are set out in the Appendix, pp. 120a-127a.

Jurisdiction

The judgment of the court of appeals was entered on August 18, 1975. On November 4, 1975, Mr. Justice Powell signed an order extending the time for the filing of this petition until January 15, 1976. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented

In this employment discrimination case, did the Court of Appeals err in holding valid a waiver, executed pursuant to an industrywide government-employer-union consent decree, of the right to sue for injunctive relief and back pay to remedy an employer's or union's failure, subsequent to the decree's entry, to eliminate continued effects of past discrimination?

Statutory Provisions Involved

Section 706(f)(1) of the 1964 Civil Rights Act, as amended, 42 U.S.C. §2000e-5(f)(1):

> If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such a notice a civil action may be

brought against the respondent named in the charge (A) by the person claiming to be aggrieved. . . .

Section 706(g), 42 U.S.C. §2000e-5(g):

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

Section 1981, 42 U.S.C.:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . .

Statement of the Case

On April 12, 1974, the United States filed this action in the Northern District of Alabama alleging that nine major steel companies and the United Steelworkers of America had engaged in discrimination on the basis of race and sex. The parties simultaneously presented to the District Court two lengthy consent decrees which had been agreed upon by the parties prior to the commencement of the action. The district judge approved both decrees on the day they were submitted. The decrees provide for certain injunctive relief to be administered by an Implementation Committee at each of several hundred plants and overseen by a national Audit and Review Committee. With the exception of a single member of the Audit and Review Committee, every voting member of these committees was appointed by, and serves at the pleasure of, the defendants. The decrees also required an offer of payment in lieu of back pay to most minority employees employed at the plants involved, conditioned upon the execution of a release of certain claims under Title VII of the 1964 Civil Rights Act and other laws. The question presented by this petition is the permissible scope of the releases which minority employees will be asked to sign.

Petitioners are black steelworkers employed at steel plants covered by the decrees. Some petitioners are parties to six Title VII cases pending in several district courts prior to the filing of this action;[1] others have charges pending before the Equal Employment Opportunity Commission (E.E.O.C.). Nine days after the decrees were approved petitioners moved to intervene for the limited purposes of attacking the legality of certain provisions of the decrees

[1] See cases cited, p. 26a, n. 10. Counsel representing petitioners are counsel of record in these cases.

and restricting the scope of any waiver to be required. The District Court, after clarifying the decrees in certain material respects, concluded they were lawful. Pp. 1a-12a. The Court of Appeals construed the decrees so as to eliminate, for the most part, those aspects which petitioners had claimed were illegal.[2]

Petitioners advanced three objections to the scope of the proposed waivers. Petitioners urged, first, that the proposed waivers were invalid to the extent to which they purported to preclude an employee from suing for additional back pay if the back pay which he received under the decrees was less than the total compensable economic loss which he suffered *prior* to the date the decrees were entered because of unlawful discrimination by the defendants. Both the District Court and the Court of Appeals construed the release proposed by the signatories to include such a waiver, and both held such a waiver valid as a reasonable compromise of an accrued monetary claim. Pp.

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[2] The Court of Appeals construed paragraph 19 of decree I to require that E.E.O.C. not recommend acceptance of the back pay unless it found, after an individualized investigation, that the decrees had in fact fully remedied the charging party's complaint. Pp. 93a-94a. Paragraph C of the decrees, which petitioners objected to as requiring the government to oppose any systemic relief sought in private actions, was held merely to require the government to suggest that consideration of such actions be deferred while the government sought to negotiate appropriate relief under the decrees. Pp. 85a-88a. The Fifth Circuit ruled that the decrees in no way reduced the information which must be given to the Office of Federal Contract Compliance, or limited the authority of the Secretary of Labor to invoke sanctions if a steel company engaged in discrimination. Pp. 96a-100a. The Court of Appeals mooted petitioners' objection that the decrees did not require detailed periodic reports to the district court by reading such a requirement into a directive of the Audit and Review Committee. Pp. 103a-105a. Certain problems remain as to whether the signatories are complying with the decrees as construed by the Fifth Circuit, and are the subject of ongoing litigation in the lower courts.

10a-12a, 54a-57a. Petitioners do not seek review of this aspect of the Fifth Circuit's decision.

Petitioners further objected that the proposed release appeared to cover monetary claims for losses occurring *after* the entry of the decrees. The District Court's opinion did not consider whether this was within the scope of the proposed waiver or, whether such claims could be relinquished in advance. The Court of Appeals apparently understood the proposed release to include such a waiver, Pp. 57a-64a; it held such a waiver valid subject to a limitation the precise impact of which is unclear. See p. 15, *infra*.

Third, petitioners contended that the proposed releases would be invalid to the extent that they purported to limit the right of an employee to sue for necessary injunctive relief if, despite the decrees, an employer continued to enforce a seniority system which perpetuated, or otherwise failed to end, any continuing effects of past discrimination. The District Court, in its 1974 opinion, made no mention of the issue. The Court of Appeals' opinion concluded that the decrees did not contemplate such an injunctive waiver, and included certain dicta regarding the validity of such a waiver, the meaning of which is in dispute.

On remand the defendants urged that the Fifth Circuit had misconstrued the decrees, and moved to amend the decrees to include an injunctive waiver. Petitioners opposed the amendment on the ground that such a waiver would be invalid and that the amendment was otherwise improper. The District Court, on January 6, 1976, held that petitioners were no longer parties to the case, rejected their renewed motion to intervene, and approved the amendment. Pp. 120a-127a. The signatories contended, and the District Court apparently concluded, that the Fifth

Circuit dicta had indicated that such an injunctive waiver would be lawful. The District Court then stated it would entertain a motion to intervene for the purpose of moving to reconsider the amendment on the narrow ground that the signatories in 1974 had not in fact agreed to provide in the decrees for an injunctive waiver. P. 122a. The January 6, decision, to the extent that it excluded petitioners from the case and rejected their contentions that the amendment was improper as a matter of law, is the subject of an appeal and petition for writ of mandamus before the Fifth Circuit. Within 10 days of the January 6 opinion petitioners intervened in the district court and moved to set aside the amendment on the narrow ground permitted by the district court. The consideration of that motion has been deferred pending discovery as to the intent of the signatories in 1974.

It is with regard to these second and third objections to the scope of the proposed release that certiorari is sought.

Reasons for Granting the Writ

1. The Importance of The Issues Involved

Although the consent decrees deal with a variety of forms of discrimination, the critical problem in the steel industry is reform of the seniority system. Prior to the entry of the decrees, and especially before 1968, most steel plants operated by the defendant companies maintained segregated departments and lines of progression.[3] The departments and lines of progression to which blacks were as-

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[3] See *Ford* v. *United States Steel Corporation*, 520 F.2d 1043 (5th Cir. 1975); *United States* v. *Bethlehem Steel Corporation*, 446 F.2d 652 (2nd Cir. 1971); *In the Matter of the Bethlehem Steel Corporation*, Decision of the Secretary of Labor, Docket No. 102-68, January 15, 1973.

signed were generally limited to poorly paid and unpleasant jobs. Although this discrimination in initial assignment has to some extent abated, many minority employees have been unable to transfer into traditionally white jobs because of the defendants' seniority system. Under that system when a vacancy occurs in an all-white department, applicants from within the department are given preference over employees from other departments. Thus if a job were sought by a white within the department who had worked for the company for only a year, and by a black from another department who had worked there for 20 years, the position would be awarded to the white on the basis of "seniority." The seniority system perpetuates in this manner the effect of past discrimination in initial assignment.

Until the seniority system is overhauled so as to eliminate this special treatment for employees in traditionally all-white departments, black employees will continue to earn less than whites solely on account of their race. The consent decrees required certain changes in seniority systems, and contemplated further negotiations among the signatories with regard to seniority; whether, as petitioners contend, the decrees are unlikely to produce meaningful reforms of the seniority systems is a question whose answer will not be known for several years. The parties propose that, as a condition of receiving a lump sum in 1976, more than 40,000 minority employees sign a waiver which provides that, to the extent that the government is unable or unwilling to negotiate reform of the seniority system under the consent decrees, those employees will be locked into their predominantly black departments for the rest of their lives, unable to seek in any federal or state court injunctive relief to reform that system or monetary compensation for the loss they may suffer in the years to come.

The District Court correctly recognized that it was of paramount importance to sound judicial administration that, before any waivers be solicited from such a large group of employees, there be a definitive judicial decision as to the permissible scope of the release. If that question is not finally resolved in the instant case, it will have to be relitigated every time an employee who signed a waiver brings an action alleging that the seniority system at his plant perpetuates the effect of past discrimination in assignment. The validity of the contested aspects of the waivers will also affect whether employees who sign them will remain as class members in the numerous private class actions now pending against the defendant companies. Thus the circulation and execution of waivers in plants covered by such class actions will necessarily give rise to a complex round of litigation as to class membership in all such actions.[4] The mere proposal to solicit such waivers has already spawned two petitions for writs of certiorari in such private actions;[5] the impact of the actual execution of such waivers will be substantially greater. Under the decrees waivers will be sought in plants in over 40 districts in ten different circuits. A definitive decision by this Court as to the permissible scope of a waiver of Title VII rights will, as a practical matter, substantially reduce the volume

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[4] The cases in which that issue would have to be resolved include *Harris* v. *Republic Steel Corp.*, No. 74-P-334-S (N.D. Ala.); *Waker* v. *Republic Steel Corporation*, Nos. 71-179, 71-180, 71-181, 71-185 (N.D. Ala.); *Dickerson* v. *United States Steel Corp.*, No. 73-1292 (E.D. Pa.); *Rodgers* v. *United States Steel Corp.*, No. 71-793 (W.D. Pa.); *Carroll* v. *Bethlehem Steel Corp.*, No. M-75-374 (D. Md.); *Lane* v. *Bethlehem Steel Corp.*, No. 71-580-H (D. Maryland); *Williamson* v. *Bethlehem Steel Corp.*, No. 71-487 (W.D.N.Y.); *Chatman* v. *United States Steel Corporation*, No. C-75-1239 (N.D. Cal.); *Taylor* v. *Armco Steel Corp.*, No. 68-129 (S.D. Tex.).

[5] *Rogers* v. *United States Steel*, cert. den. 46 L.Ed. 2d 50 (1975); *Dickerson* v. *United States Steel*, cert. den. 421 U.S. 948 (1975).

and scope of litigation produced by the solicitation of waivers from tens of thousands of employees.

Such a decision by this Court is also necessary to establish guidelines for the government in other cases. The Department of Justice and the E.E.O.C. enter each year into a substantial number of consent decrees and more than 5,000 conciliation agreements which generally involve some form of waiver. The type of waiver agreed to varies from the sweeping prospective release in the instant case to a more narrow release of accrued money claims such as used in the nationwide trucking consent decree.[6] These differences reflect differing responses by government attorneys to efforts by negotiators for companies and unions to turn such decrees or agreements into devices to impede or thwart private litigation. The thrust of such efforts is to defeat the intent of Congress that the remedies provided to employees and to the government remain independent and complementary. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47-48 (1974). See, *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975). Petitioners maintain that here, as in other cases,[7] the government has gone too far in acceding to employer and union demands that a consent decree be used in this manner. To the extent that the Court of Appeals has also erroneously accepted the sweeping waiver sought by the defendants, it has sanctioned a concession which the government will be hard pressed to withhold in subsequent cases. That error will, unless corrected by this Court, have ramifications far beyond this particular case.

These problems, arising as they must in federal courts throughout the country, require the definitive nationwide

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[6] *United States* v. *Trucking Employers, Inc.*, C.A. No. 74-453, D.D.C.

[7] See pp. 55a-56a, n. 30.

resolution which only this Court can provide. Even within the Fifth Circuit the decision of the Court of Appeals has failed to clearly resolve the questions presented by this petition. The Fifth Circuit's decision sanctioned a release as to the "continuing effects of past discrimination" and ruled unlawful any release with regard to post-decree acts of discrimination, but left in doubt whether a company's future failure to reform its seniority system to end such continuing effect would itself constitute a new act of discrimination. See pp. 57a-64a. The latter question is of critical importance to both this case and a substantial segment of American industry. The disagreement among the parties as to the proper construction of the Fifth Circuit's decision became apparent four months after that decision when the defendants moved to amend the decrees to provide for an injunctive waiver, arguing that an employee could waive in advance his right to sue to reform the seniority system since, in defendant's view, the future application of such a system would not constitute a new act of discrimination. The questions posed by the proposed waiver of future monetary and injunctive relief are too important to the other related pending cases, to government policy, and to the tens of thousands of minority employees in the steel industry, to be left in the ambiguous state created by the decision of the Court of Appeals.

2. The Proposed Waiver of Future Injunctive Relief

Whether the defendants, prompted by the consent decrees, will in fact reform their seniority systems to permit blacks to compete for promotions on an equal basis with whites is, as of now, a matter of conjecture. The consent decrees in this regard constitute a framework for further negotiation between counsel for the government, the employers, and the union. Many critical areas, such as the merger of departments and lines of progression, are ex-

pressly reserved as subjects for further discussion on a plant by plant basis. Pp. 104a-05a. The provisions of both decrees are to be reconsidered by the signatories in 1976. It cannot now be foreseen whether, in the years ahead, the substantive provisions of the decrees, together with such further concessions as the government can exact, will, in any particular plant, eliminate the discriminatory aspects of the pre-decree seniority system.

The parties propose that, as a condition of receiving a payment in lieu of back pay under the decrees, the release required of each employee include a waiver of his right to sue for necessary injunctive relief if the seniority system is not fully reformed. P. 126a. Should a minority employee sign such a waiver and subsequently discover that he is still locked into a poorly paid all-black department, he will have no right to sue. At a plant where the decrees are generally ineffective, a whole generation of black workers would, for the rest of their careers, be relegated to the jobs to which they were initially assigned on the basis of race. Although the consent decrees can be vacated on the motion of any signatory in 1979, the waivers remain binding for the indefinite future. The signatories insist that, even if a court should at some future date hold a seniority system illegal because it perpetuates the effect of pre-decree discrimination, the employer would be free to apply that illegal system to any employee who had signed an injunctive waiver.[8] Such a release is not a compromise of accrued claims, it is a license to break the law.

In *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) an aggrieved employee, prior to commencing a Title VII action, sought arbitration under a procedure which pro-

[8] Transcript of Hearing of January 2, 1976, pp. 26-30; 34-35.

vided that it would be "final and binding upon the Company, the Union, and any employee or employees involved". 415 U.S. at 42. The arbitrator found there was no racial discrimination, and the employer argued that the employee, by submitting his claim to binding arbitration, had waived his rights to sue under Title VII. This Court held:

> We are also unable to accept the proposition that petitioner waived his cause of action under Title VII. To begin, we think it clear that there can be no prospective waiver of an employee's rights under Title VII . . . Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices . . . In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver. 415 U.S. at 51-52.

The waiver in *Alexander* was prospective in that, although the disputed employer conduct occurred before the purported waiver, the employee committed himself in advance to obtaining only so much relief as the arbitration would thereafter award. The holding of Alexander applies *a fortiori* to the waiver proposed in this case. Not only is an employee asked to limit himself to such seniority relief as the government chooses to negotiate for him, the employee is asked to do so with regard to seniority problems which, as a result of unforeseeable patterns of vacancies, layoffs, and attrition, may only arise several years in the future.

Respondents seek to avoid the obviously prospective nature of such a waiver by asserting that the only "act of discrimination" was the creation prior to 1974 of black and white departments and that the application of a rule which gives preference to employees of the all-white department is not an "act of discrimination", but merely a "con-

tinued effect of past discrimination." Since the "discrimination" occurred in the "past", respondents reason that the waiver is retrospective even when applied to events transpiring in 1980 or later. But *Alexander* cannot be distinguished by such semantic sleight of hand. No court in the land would uphold releases signed by the parents of school age children purporting to relinquish their right "to eliminate from the public schools all vestiges of state imposed segregation." *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 15 (1971). Nor would this Court enforce a waiver signed by a citizen denied the right to vote which contained language abandoning the right to judicial relief which would "so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States,* 380 U.S. 145, 154 (1965); see, *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 418-19 (1975). The proposed waiver of the right to sue for injunctive relief is no different; to the extent the Court of Appeals approved such a waiver its opinion is in conflict with the decision of this court in *Alexander.*

The respondents maintain, and the district court apparently concluded, that the Fifth Circuit held that such an injunctive waiver would be valid.[9] Petitioners believe the Court of Appeals' decision is ambiguous as to whether, and if so when, a defendant's failure to reform a seniority system which perpetuated the effect of past discrimination would itself constitute a new "act of discrimination" relief from which, under the Fifth Circuit's opinion, could not be waived. Pp. 60a-64a. As is more fully set out in the accompanying Motion to Defer Consideration, whether the release to be required of employees should include an injunctive waiver is still the subject of proceedings in both the

[9] See Transcript of Hearing of January 2, 1976, pp. 49-53.

District Court and Court of Appeals. For this reason petitioner would suggest that consideration of this petition be postponed until the lower courts have finally decided whether to permit the inclusion of such an injunctive waiver.

3. The Proposed Waiver of Future Monetary Relief

In return for the back pay to be offered under the consent decrees, the defendants propose that the release required from each employee waive his monetary claims "for *damages* incurred *at any time* because of continued effects of complaint or decree-covered acts or practices which took place on or before the entry date of the consent decrees." [10] P. 57a. The Court of Appeals held that minority employees could compromise in this manner their back pay claims for financial loss which occurred *prior* to the date of the consent decrees, April 12, 1974. Pp. 64a-81a. Petitioners do not seek review of this aspect of the Fifth Circuit's decision. Petitioners maintain, however, that the Court of Appeals erred insofar as[11] it approved the use of a release which would waive an employee's right to sue for financial loss which occurs *after* the entry of the consent decrees because of the defendant's failure to end the continuing effects of past discrimination.

A waiver of back pay claims which will accrue at some future date is a prospective waiver forbidden by this

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[10] Paragraph 18(c) of consent decree I proposes that the release "bar recovery of any damages suffered at any time *after* the date of entry of this decree by reason of continued effects of any such discriminatory acts which occurred on or before the date of entry of this Decree". P. 55a. (Emphasis added)

[11] It is unclear at what point, if any, a defendant's failure to end such continuing effects would constitute a new "act of discrimination" for which back pay could be sought. See pp. 13-14. The actual release approved by the District Court contained no limitation of this sort on the prospective monetary waiver.

Court's decision in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974). See p. 13, *supra*. Such a prospective waiver of Title VII rights is also inconsistent with *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). Back pay is mandated in Title VII cases, not merely to make an employee whole for any violation of his rights, but also to deter an employer or union from failing to correct employment practices which discriminate or continue the effects of past discrimination.

> If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a back pay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." 422 U.S. at 417-18.

The critical question in the steel industry is whether the employers and union will modify the seniority system so that the pre-decree discriminatory assignment of a generation of blacks to all-black and poorly paid departments will not have a continuing discriminatory impact on those blacks in the years ahead. Should minority employees execute the proposed waivers they would have the effect, if valid, of removing any financial incentive for the steel companies and union to reform that seniority system. If the companies and union are rendered immune from such liability, the spur for reform contemplated by Title VII would be vitiated. To the extent that the Court of Appeals approved such a prospective waiver of monetary relief, its decision is inconsistent with the decisions of this Court, in *Alexander* and *Moody*.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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